Supreme Court of the United States.

OCTOBER TERM, 1901.

Original.

STATE OF WASHINGTON, COMPLAINANT,

vs.

NORTHERN SECURITIES COMPANY, GREAT NORTHERN RAILWAY COMPANY, AND NORTHERN PACIFIC RAILWAY COMPANY, DEFENDANTS.

Brief on Behalf of Defendant Railway Companies, Upon Motion for Leave to File Bill.

If the organization and acts of the Northern Securities Company infringe upon any rights of the State of Washington the state is certainly entitled to redress, and if the bill now presented shows such an infringement and makes out a case of which this court, without departing from its settled practice, may properly take cognizance, the defendants have reason to welcome rather than to oppose the course of the state in resorting to this, the highest court in the land, whose decision will everywhere be received as authority.

This court has, however, by a series of decisions, deter-

mined that not every suit brought by a state against citizens of another state is the proper subject of cognizance, has defined what original suits a state may and what suits it may not bring against citizens of another state, and has wisely determined that the question whether an original suit proposed to be brought falls within one class or another—whether the court will or will not take cognizance of it—shall be passed upon at the outset, when the declaration or bill is offered for filing.

In view of the character of the original jurisdiction of the court, the question whether it shall be exercised in a given case is of an importance by no means limited to the effect of the decision on the parties to it. In the recent case of *Minnesota v. Northern Securities Company* the court indicated a willingness, if not a wish, to hear argument, by ordering notice to be given of the motion to file the bill. That case went off on a question of defect of parties. In *this* case that defect does not exist, but in respect of other questions sought to be raised, this case closely resembles that of the State of Minnesota. In determining questions so important, we assume that the court will now, as before, desire the assistance of counsel.

We accordingly submit the following considerations as showing that the state has not in its bill made a case of which the court can, without departing from its settled doctrine and practice, take cognizance.

Whether the state has made such a case depends on the nature of the right, if any, asserted in the bill, which the suit is brought to enforce, the nature of the violation, if any, of the right, which the state seeks to prevent or redress, and the nature of the relief sought, whether within or beyond the competency of the court to grant.

The gist of the bill is:

That certain stockholders of the two defendant railway companies (one a corporation of Minnesota, the other a corporation of Wisconsin) have caused to be formed under the laws of New Jersey the Northern Securities Company, with the intention of making that company the holder of a majority of the stock of the two railway companies; that, in pursuance of this plan, the Securities Company has acquired a majority of such stock. The articles of incorporation of the Securities Company are set forth, and it appears (and must be here presumed) that it has all the power of a natural person to buy, hold, vote, and sell stocks; but its right to hold and vote the stock in question is challenged because the lines of the railway companies (some part of which is in Washington) are parallel and competing.

Though the alleged wrongful acts were done, not in Washington, but in New Jersey, the complaining state says they are illegal and should be enjoined by this court because in violation of those sections of article 12, constitution of Washington, reading as follows:

> "SEC. 14. No railroad company or other common carrier shall combine or make any contract with the owners of any vessel that leaves port or makes port in this state, or with any common carrier, by which combination or contract the earnings of one doing the carrying are to be shared by the other not doing the carrying."
>
> "SEC. 16. No railroad corporation shall consolidate its stock, property, or franchises with any other railroad corporation owning a competing line."
>
> "SEC. 22. Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership, or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or with any copartnership or association of persons, or in any

manner whatever, for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise."

The State of Washington is a political corporation with full sovereignty, except so far as surrendered to the United States, over the district or country known by that name. Among the powers surrendered to the United States is that to regulate interstate commerce, and as to that commerce the State of Washington has no power beyond that of legislating in the way of police to protect the lives, health, and well-being of its citizens. It has no power to regulate that commerce. But as to commerce local to the State there is now no question as to its power to fix reasonable railway rates (*Chicago, Milwaukee & St. Paul R'y Co. v. Minnesota*, 134 U. S., 418; *Minneapolis Eastern R'y Co. v. Minnesota*, 134 U. S., 467; *Smyth v. Ames*, 169 U. S., 466); to compel roads to make connections with other railroads for the purpose of transferring cars (*Wisconsin Railroad Co. v. Jacobson*, 179 U. S., 287); to regulate the running of passenger trains so as to accommodate communities along the lines (*Lake Shore R'y Co. v. Ohio*, 173 U. S., 285); to regulate the heating of passenger cars and the manner of running trains (*New York R. Co. v. New York*, 165 U. S., 628); and generally to regulate the operation of railroads, require the construction of proper stations and facilities, bridges and street crossings, or the performance of any other service reasonable in the maintenance and operation of a public highway (*Cleveland*

R'y Co. v. Illinois, 177 U. S., 514; *State v. Minneapolis & St. Louis R'y Co.*, 80 Minn., 191).

In short, as to local rates and facilities the State of Washington has full power so long as its requirements are reasonable. Neither the state nor any citizen has any right to demand or require what is unreasonable, and certainly no equity to come into this court to obtain unreasonably low rates by injunction. Reasonably low rates it may obtain by its own statutes and in its own courts. The bill does not allege any accomplished injury, but complains of acts which it is alleged have a tendency to injure. The bill does not say that any rate has been raised, or that any rate is unreasonably high, or that any reasonable facility of traffic is not furnished. Neither the state nor its citizens can suffer any actual injury unless, either unreasonably high rates are charged, or inadequate facilities furnished. As to these matters the state has the remedy in its own hands in its own jurisdiction. The original jurisdiction of this court in equity cannot, we submit, be invoked where the state has in its own legislature and courts a full, adequate, and perfect remedy.

In this bill the state seeks in a foreign jurisdiction a remedy by injunction to compel the Northern Securities Company, a New Jersey corporation, to conform to and obey what it conceives to be its law and policy; this although the Securities Company is lawfully organized in the State of New Jersey with power to buy and hold stock, and is doing no act which it is not authorized to do by the law of the state of its organization. Its acts were all done in that state and none of them in the State of Washington. The bill

asks this court to restrain by injunction a citizen of New Jersey from doing there acts entirely lawful according to New Jersey laws and sanctioned by the policy of that state, on the allegation that those acts either violate, or evade, or tend to render nugatory, laws of the complainant state. The sole ground of complaint is the alleged violation in New Jersey of certain enactments contained in the constitution of Washington. The injunction prayed for would be nothing more or less than compelling the defendant to obey in New Jersey the laws of Washington.

The sum and substance of the grievance is, that the ownership of the shares of the two defendant railway companies, formerly vested in several persons, has now been united in one holder, and that holder a corporation. But reference is made to no Washington statute, and none exists, which prohibits individuals or copartnerships or private corporations having charter authority from acquiring and holding stocks of parallel or competing railroad companies. On the contrary, the corporation laws of the State of Washington (1 *Ballinger's Code*, sec. 4261) make stock personal property, and of course it is salable as such according to the law of the place where it is sold. The provision in the statute quoted, that the stock shall be transferable only by registry on the corporate books, is a declaration that, except as far as so limited, it is transferable according to the customs of the commercial world (*Bank v. Lanier*, 11 Wall., 369, 377).

There is not one syllable in the constitution or statutes of Washington which purports to abridge the right of individuals, partnerships, or corporations to buy stock, and the complainant is driven to *infer* so important a prohibition.

And more than this. The right asserted by the State of Washington—the right and the only right which she claims has been violated—is the right to dictate who may and who shall not be shareholders in two railway companies, one chartered by Wisconsin, the other by Minnesota. Washing-

ton may prescribe the qualifications for shareholders in companies of her own creation. She may authorize or forbid the purchase of shares in foreign companies by her own corporations and possibly by her individual citizens. But the right here asserted, to dictate that a corporation of New Jersey shall not become a shareholder in a corporation of Wisconsin or of Minnesota, has no basis whatever in principle or authority. Every state in the Union—certainly every state through which these railways run—has as valid a claim as Washington to the right she here asserts, and it is needless to picture the results of their exercise of it.

The court should not allow this bill to be filed if it plainly appears that no decree could be rendered upon it in favor of complainant. The court considered, in *Pearsall v. Great Northern Railway Company*, 161 U. S., 646, 671, and in *Louisville and Nashville Railroad Company v. Kentucky*, 161 U. S., 677, 693, a statute of Minnesota and a provision of the constitution of Kentucky prohibiting the consolidation of parallel and competing roads, which were stronger and broader than section 16, article XII, of the Washington constitution. The court said in the former case (pp. 671, 672):

> "Doubtless these stockholders could lawfully acquire, by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common. This, though possible, would not be altogether feasible, and would require considerable time for its accomplishment. In a few years the two companies might by sales of the stock so acquired, become completely dissevered, and the interests of the stockholders of each company thus become antagonistic."

And in the latter case (p. 693):

> "It is true, as was observed in *Pearsall v. The Great Northern*, that the stockholders of the L. & N. Co. may individually become the purchasers of the Chesa-

peake Co. at a judicial sale, and may organize a new corporation, but it would still be a corporation separate and distinct from that of the L. & N. Co. The inhibition of the constitution is not against the sale to individuals, though they may chance to be stockholders in a competing line, but against the acquisition by a railway, in any form, of a parallel or competing line."

See also, to the same effect, *Havemeyer v. Havemeyer*, 43 N. Y. Superior Ct., 515; *Commonwealth v. R'y Co.*, 139 Pa., 457, reaffirming doctrine held in 132 Pa., 591; *White v. Ryan*, 15 Pa. C. C., 170.

We submit that the court in the language above quoted passed upon the fundamental and essential question presented by this bill, so far as concerns so-called consolidation of competing railways. If any law could, it is clear that no law has attempted to say that one or several individuals could not purchase and hold all the stock of two competing roads. So doing is neither prohibited by morality, nor by statute, nor by any rule of the common law. It is perfectly innocent and lawful. If one man may buy stock in two competing roads, doubtless a partnership may; or several men, having already acquired the stock, may lawfully form a partnership and turn in the stock as partnership assets; or a corporation, having by the law of its organization the same power which an individual has to buy and hold stock, could buy and hold the stock of parallel and competing railways as an individual might; or several individuals, having acquired stock in competing roads, might lawfully form a corporation and might make the stock corporate assets as lawfully as they might make it partnership assets.

This right is not impaired by any of the sections of the Washington constitution cited. The prohibitions of section 16 are directed wholly against competing railway companies. A corporation and its shareholders are different entities (*Baldwin v. Canfield*, 26 Minn., 43; and see *Bank of U. S. v. Planters'*

Bank, 9 Wheat., 904, 907, decided in 1824, when, for purposes of jurisdiction, the court looked to the citizenship of the shareholders in suits against corporations). Neither a single stockholder, nor a majority of stockholders, nor 95 per cent. of the stockholders are the corporation (*Humphreys v. McKissock*, 140 U. S., 304, 312). The court held in *Pullman Car Co. v. Missouri Pacific R'y*, 115 U. S., 587, that ownership of all the stock of a corporation did not constitute "control," saying, pp. 596, 597:

> "We are also of opinion that the railroad of the St. Louis, Iron Mountain and Southern Company is not controlled by the present Missouri Pacific Company in such a way as to require that company to haul the Pullman cars over it, if the contract is binding on the new company to the same extent it would be on the old were that company still in existence and standing in the place of the new. Confessedly the St. Louis, Iron Mountain and Southern Company keeps up its own corporate organization. It operates its own road. It has its own officers and makes its own bargains. The Missouri Pacific owns all or nearly all its stock, and in that way can determine who shall constitute its board of directors, but there the power of that company over the management stops. The board when elected has controlling authority, and for its doings is not necessarily answerable to the Missouri Pacific Company. The two roads are substantially owned by the same persons and operated in the same interest, but that of the St. Louis, Iron Mountain and Southern Company is in no legal sense controlled by the Missouri Pacific. * * * The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain and Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily

> they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain and Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company that company has no power to prevent it, except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property."

The provision of the constitution forbidding either of two competing *railroad* companies from doing certain things is upon its face and by its plain meaning no more a prohibition to the stockholders of either in their individual capacity than the provision in the constitution of Minnesota (art. IX, sec. 5) that "the state shall never contract any debts for works of internal improvements, or be a party to carrying on such works," is a prohibition to its citizens. This constitutional provision is held not even to apply to cities (*Davidson v. Commissioners*, 18 Minn., 432, 442).

To charge the defendant railway companies or their directors with responsibility for their stocks being held by one person or corporation is absurd. A corporation and its board of directors have no right to decide who shall hold its stock; that matter does not concern either the corporation or board. Suppose an individual or a securities company had presented shares to the board of either of these railway companies for transfer on its books. Could the board properly have said, "We decline to recognize your

ownership, because we apprehend you have also bought, or are seeking to buy, stock in a competing railway, and this we conceive to be harmful to public interests?"

If the legislature had intended to include individuals, partnerships, and corporations other than railway companies, the prohibition would have been directed in plain terms against them. The insertion of a few simple words was all that was necessary to express the intention now claimed by the state, and it cannot be conceived that the legislature had that intention and yet refrained from so easy an expression of it.

The prohibition is against consolidating the "stock, property, or franchises" of one railroad corporation with any other railroad corporation owning a competing line. The term "consolidate" was defined by the first legislature of Washington which met soon after the adoption of the state constitution, and which doubtless contained many of the framers of that instrument (1 *Ballinger's Code*, sec. 4304). This statute opens with language which follows almost word for word the provisions of section 16 in article XII of the constitution: "Any such railroad corporation may consolidate its stock, franchise and property with any other railroad corporation * * * *and become one corporation.*" The act then provides that articles shall be adopted by each corporation and filed in a public office stating the terms of the consolidation.

This statute contains a correct definition of the term "consolidate," according to its usual signification (2 *Morawetz on Corp.*, sec. 939, and cases cited; *Green County v. Conness*, 109 U. S., 104, 106; *Central Railroad v. Georgia*, 92 U. S., 665, 670, 671; *Tennessee v. Whitworth*, 117 U. S., 139, 147; *Archer v. R'y Co.*, 102 Ill., 493, 503; *Beach on Corporations*, sec. 328; *State ex rel. Nolan v. Montana R'y Co.*, 21 Mont., 221; *Gore v. R'y Co.*, 19 Abbott's New Cases, 193, 210).

As this court pointed out in the *Pearsall case*, the ownership by one individual or set of individuals of stock in two

competing railway companies is not consolidation and not within the meaning or spirit of the statute, because at any time the stock so acquired may be parted with, and any relations between the companies become completely dissevered, and the interests of their respective stockholders antagonistic.

But the bill charges that the acts complained of are an *evasion* of the constitution. It is not alleged, however, that there is any subterfuge or concealment. The real transaction is just as it appears. Individual stockholders of the two railway companies have seen fit to turn their stock over to a corporation alleged to have been formed with that intent and purpose. On its face this is either within the statutes or outside of them. It cannot be held illegal as an evasion of the statute, without saying that this court in the *Pearsall case* and in the *Louisville & Nashville case* pointed out to the parties how to evade the statute.

The notion that to do a thing not forbidden by statute, but which may produce the same or some of the same results as a thing which is forbidden, is illegal because it is doing indirectly that which the law forbids doing directly, is responsible for some loose argument and decision. It should have received its quietus from recent decisions in the House of Lords and Privy Council (*Bullivant v. Att'y Gen. of Victoria* (1901), A. C., 196; *Simms v. Register of Probates* (1900), A. C., 323).

What one man may lawfully do singly, two or more may lawfully agree to do jointly—that is, if the act is not immoral or wrongful. For a number to conspire to do a thing wrong or unlawful may be a crime, though for one to do

the same thing may not be a crime. But unless we greatly misunderstand the law, a thing which it is rightful and lawful for one person to do may lawfully be done by a combination of persons. As Justice Mitchell very well said in *Bohn Mfg. Company v. Hollis*, 54 Minn., 223, 234:

> "What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose remarks apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal. Hence, the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case. We have referred to this for the reason that counsel has laid great stress upon the fact of the combination of a large number of persons, as if that, of itself, rendered their conduct actionable. (*Bowen v. Matheson*, 14 Allen, 499; *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div., 598; (1892) App. Cas., 25; *Parker v. Huntington*, 2 Gray, 124; *Wellington v. Small*, 3 Cush., 145; *Payne v. Western & Atlantic R. Co.*, 13 Lea, 507.")

The case of *Mogul Steamship Co. v. McGregor* will be found a very satisfactory authority on this question.

Whatever injurious effect may be likely to follow from a misuse of power incident to ownership of a majority of shares

in two competing railway lines, that power is no more likely to abuse because it rests in several men, or in a corporation, rather than in one man.

The most astonishing extreme reached by the bill of complaint is the statement that the Northern Securities Company is "a railroad corporation" within the meaning of the laws of Washington. Yet it is only upon this forced and preposterous contention that the complainant can possibly point out any supposed breach of her laws. This branch of the complainant's contention need not be further noticed, because it is clear that the securities company has no franchise either to build, operate, or manage a railway, its power being limited to the owning of stock and doing such acts as an individual owner of stock might lawfully do.

While it may be conceded, in accordance with the doctrine of *Attorney General against The Railroad Companies*, 35 Wis., 425, and *Stockton v. Central Railroad Company of New Jersey*, 50 N. J. Eq., 52, that a state may in a proper case in its own courts enjoin corporations to obey its laws within its own territory, there is no precedent, we submit, of a state or other sovereign power enjoining in the courts of a foreign state obedience to the statutes of the complaining state. It is a general principle that statutes can be enforced by a state within its own jurisdiction only (*Wisconsin v. Pelican Ins. Co.*, 127 U. S., 265).

This rule, as we understand it, is not confined to mere

penal statutes, but is of general application. It is a general principle of international law that the statutes of one country have no effect or operation in another. Can it be possible that a statute of Washington is rendered enforceable in the courts of foreign countries by the omission of penalties when the same statute would not have been enforceable if penalties had been added? Do police statutes without penalties differ in principle from statutes with penalties? Surely, the nature of the law is the same in either case, and in either case may properly be given the same extraterritorial obligation. A penalty is simply one form of punishment for disobedience; and if a law imposing a penalty cannot be enforced extraterritorially a different rule cannot be applied to the same law because it omits the penalties and merely commands obedience (*Security Trust Co. v. Dodd, Mead & Co.*, 173 U S., 624, 629).

Can one nation sue in the courts of another to collect its customs or other taxes? In the case of *King of Spain v. Oliver*, Peters C. C., 276, it was conceded that the King could sue for the customs duties claimed only on proof of a contract or bond to pay them. See the case explained by Mr. Justice Gray in *Wisconsin v. Pelican Ins. Co.*, 127 U. S., 290.

Suppose a number of citizens of New York are engaged in that state in a scheme which, if successful, would fraudulently conceal from taxation property in Washington liable thereto or hinder the collection of taxes thereon. Could the state maintain a suit in this court to restrain such proceedings of those persons?

Suppose the State of Washington has a stringent pure-food law forbidding the sale within the state of adulterated goods. One or more persons in another state, citizens of that state, are engaged in making adulterated food products to be secretly shipped into Washington, and there sold to consumers. Would a bill to enforce such a statute by en-

joining the carrying out of such scheme be entertained in this court?

Suppose the State of Washington, like most of the other states, has a stringent insurance law forbidding unlicensed companies from insuring property in the state. One or more companies of other states are, without license, secretly issuing policies within the state. Can the state sue in this court to enjoin such violation of its statute?

Suppose two railway companies, incorporated in Illinois, operate lines in Washington, whose statutes prohibit any discrimination in railway rates as between persons or places. Those companies in Illinois agree upon discriminating rates upon traffic between points in Washington. Could the State of Washington sue in this court to enjoin those Illinois corporations from thus violating its statutes?

And in any one of these cases, could the state maintain such a suit in the courts of another state or country, or in any jurisdiction but its own?

If the state can sue in equity in another jurisdiction to enjoin a threatened violation, or a continuance of an existing violation, of any of these statutes, why can it not, after such violation, sue at law in another jurisdiction for the statutory penalty made recoverable in a civil action, or for damages?

That it cannot sue at law is plainly held in *Wisconsin v. Pelican Ins. Co., supra.* And what reason can be given in support of the right to sue in equity in a foreign jurisdiction to enforce such statutes which would not equally sustain an action at law?

If a state may sue in a foreign jurisdiction to enjoin an obstruction to the collection of taxes on personal property within its limits, it may certainly sue there to collect them, if by its laws such taxes are collectible by action. The right of the state to have the collection of taxes unobstructed is no greater than, and no different from, its right to have the taxes paid. An obstruction of collection and a direct

refusal to pay are a violation of the same statutory right of the state. Could the state sue in this court to collect its taxes?

If the state can, as a sovereign, bring this suit in this court to enjoin the violation of the statutes here involved, it might—and every other state in like circumstances might—bring an original injunction bill in this court in every one of the cases supposed and in numberless others—indeed, in case of any attempted violation of almost any of its statutes of a public and governmental nature, especially any of the statutes passed in the exercise of its police power—and the original cases on the docket of the court would be the rule as they have heretofore been the exception.

In the *Pelican Insurance case* (page 289), the court, in speaking of its original jurisdiction under the Constitution, said:

> "The grant is of 'judicial power,' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other state at all."

That is, this court will not originally entertain a suit brought by a state which the state, on principles of international law, could not maintain in the courts of England or of one of the other states. We think the most diligent search will fail to find any case in England or in this country where a state or sovereign has maintained in any foreign court a suit solely to enforce its own laws. Undoubtedly a state may sue to recover its own *property*, and such a case could be maintained though the title to the property had passed in the complaining state by virtue of a statutory forfeiture. So suits can be maintained in a foreign country to enforce a contract, good by virtue of the laws of the country where it was made. So an action may be maintained in a foreign jurisdiction for death, although

the cause of action rests on a statute, and suits by creditors to recover against stockholders or officers of a corporation can sometimes be maintained, though the liability arose out of a foreign law. But in all these cases the courts enforce, not the law of a foreign state, but a right created under it. The foreign law has already enforced itself and done its work within the foreign territory in creating the right, whether of property or contract, and needs not, nor is it capable of, further enforcement in the particular case, whether in the domestic or in foreign courts. This suit is not to recover property or collect a debt, but is brought purely to enforce the foreign law. It is, moreover, a suit to aid the complaining state in enforcing its laws by injunction. The absence of any precedent for such a suit should be conclusive.

Section 14 of article XII of the Washington constitution does not touch the case. It is a prohibition against the pooling of earnings by common carriers. Substantially the same provision was in that section of the constitution of Kentucky considered by this court in the *Louisville & Nashville case* and it did not prevent this court from saying that the same persons might lawfully acquire the control by stock ownership of two competing railways. Moreover, the prohibitions of this section, like those of section 16, are directed only against action of *carrying corporations as such.*

The other section referred to (section 22 of article XII) is not completely quoted in the bill of complaint. It closes by this declaration:

> "The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise."

The section is evidently not self-executing. It does not in and of itself constitute a sufficient rule, either defining the right or duty created, or providing means for its enforcement. While the provision might be regarded as mandatory to the legislature to enact the needful legislation, that legislation not having been passed, the constitutional section standing alone merely indicates principles, without laying down any rules by means of which those principles may be given the force of law (*Cooley's Constitutional Limitations*, pp. 99, 100). On the latter page Judge Cooley says:

> "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law."

In a much stronger case this court held that the constitution of Mississippi was not self-executing (*Groves v. Slaughter*, 15 Pet., 495, 499–501). The constitution of Mississippi said, "The introduction of slaves into this state as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833." (See also *French v. Teschemaker*, 24 Cal., 518.)

This court is without the benefit of any decision of the supreme court of Washington as to whether this section is self-executing, or as to (*a*) whether it applies to any except corporations organized in that state, or (*b*) whether it applies to acts done outside the state, or (*c*) as to what is a monopoly

or trust within its meaning, or (*d*) as to what is a *combination* within its terms, or (*e*) as to whether the individual acts of stockholders, as distinguished from their acts on behalf of the corporation, are intended to be reached.

In *Wood v. Seattle*, 23 Wash., 1, 20, 21, the supreme court of the complaining state held that this section did not prohibit the *consolidation* of competing street railway lines.

Little need be said as to those allegations of the bill showing the state to be a land owner and shipper. Up to this point we have endeavored to show (*a*) that the acts of the defendants are lawful; (*b*) that whether lawful or not the State of Washington cannot maintain this suit. If we are correct on either of these propositions, it disposes of the whole bill, including the allegations just mentioned.

In respect of these allegations the state devests itself of its sovereign character, and must make in its bill the case required to be made by any individual land owner or shipper suing in any court of general jurisdiction.

No injury has yet been sustained. True the railway companies are not yet building branches into the state's unimproved land, but that is a thing they have made no contract to do and are not obligated to do. It appears from the bill they and their predecessors have steadily refrained from doing so during all the years of their existence. If the omission to build these branches has gone on for many years without actionable injury to the state, it is hard to see how the continuance of the omission from November 13, 1901, until the present time is an injury entitling the state to an injunction. Neither company has any inducement to build these branches except the profit to be derived from them, and that inducement will be as strong and the branches are as

likely to be built, the majority of stock being owned by the Securities Company, as would be the case if the stock were distributed among many holders.

If the state as a land owner and shipper may bring a bill like this, so may every land-owner in Washington and every one in Washington, or out of it, who is shipping, or likely in the future to ship over either railway; for the gist of the complaint is not that the state has already been overcharged on any shipment, nor that either railway has threatened to overcharge it on any shipment it is about to make, but simply that from the infirmity of human nature the state apprehends an injury.

A state as sovereign may under the doctrine of *Attorney General vs. Railway Companies*, 35 Wis., sue in its own courts to compel corporations within its jurisdiction to obey its laws. That jurisdiction does not depend on the existence or non-existence of an adequate remedy at law and may be exercised without showing damage. But a state as a shipper can bring no suit in a foreign jurisdiction except upon those principles which control suits by other shippers. Can it be possible that every shipper on these railways could maintain injunction suits to restrain the Northern Securities Company from holding stock in the two defendant railway companies? As a shipper and standing like other shippers, the state could not maintain an injunction bill in a foreign court without showing the inadequacy of its remedies at law. The state as a shipper has, like other shippers, a plain, adequate, and complete remedy to test at law the reasonableness of rates.

GEO. B. YOUNG,
M. D. GROVER,
C. W. BUNN,
Of Counsel for Defendant Railway Companies.